**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR**

**TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929**

**SA.No. 478 of 1994()**
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**AS.5/1988 of SUB COURT, TIRUR**
**OS.218/1983 of MUNSIFF'S COURT.,PARAPPANANGADI**
**.....**

**APPELLANT: APPELLANT:DEFENDANT:**
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**VADAKKUMTHANI KUNHIRAMAN NAIR,**
**S/O.MADHAVIKUTTY AMMA,**
**ARIYALLUR AMSOM AND DESOM,**
**TIRUR TALUK, MALAPPURAM DISTRICT. ( D I E D)**
**LR'S IMPLEADED:**

***ADDL.APPELLANTS 2 TO 5 ARE IMPLEADED:**

**A2. C.K.JANAKI AMMA,**
**W/O.LATE KUNHIRAMAN NAIR, ARIYALLUR AMSOM AND DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.**

**A3. K.DEVADAS, S/O.LATE KUNHIRAMAN NAIR, ...DO...DO...**

**A4. K. MOHANDAS, S/O...DO...DO.....**

**A5. K. USHA, D/O...DO...DO....**

**LEGAL REPRESENTATIVES OF THE DECEASED SOLE APPELLANT ARE IMPLEADED AS ADDL.APPELLANTS 2 TO 5 AS PER ORDER ON C.M.P.NOS.1105 & 1106 DTD. 14/08/96.**

**BY ADV. SRI.V.R.VENKATAKRISHNAN**
**SRI.S.ANANTHAKRISHNAN**
**SRI.N.C.JOSEPH**

**S.A.NO.478/1994**

**RESPONDENTS: NOT PARTIES LRS OF RESPONDENT:**
**NOT PARTIES LRS OF PLAINTIFF:**
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**CHANGARAM PILLAI KARUPATH MADAHVAN NAIR (DIED)-LRS.**

1. **E.MEENAKSHI AMMA, W/O. CHANGARAM PILLAI KARUPATH MADHAVAN NAIR, ARIYALLUR AMSOM AND DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.**
2. **V.PRABHAKARAN, S/O.LATE MADHAVAN NAIR,..DO..DO....**
3. **V.RADHA, D/O...DO..DO....**
4. **V.GOPALAKRISHNAN, S/O..DO..DO..**
5. **E.VASANTHA, D/O..DO..DO...**
6. **E.REMA, D/O..DO..DO...**
7. **E.SASIKALA, D/O..DO..DO...**
8. **E.MADHUSOODHANAN, S/O..DO..DO...**
9. **E.AJITHA, D/O...DO..DO....**

**BY ADV. SRI.K.P.DANDAPANI (SR.)**
**SMT.SUMATHY DANDAPANI**
**SRI.MATHEW KURIAKOSE**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

*KSS*

**M.SASIDHARAN NAMBIAR,J.**

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S.A. NO. 478 OF 1994

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Dated this the 27th day of November, 2007

JUDGMENT

Defendant in O.S.218/1983 on the file of Sub Court, Tirur is the appellant. On the death of appellant, his legal heirs were impleaded as additional appellants 2 to 5. Respondents are the legal representatives of the original plaintiff. Deceased plaintiff instituted the suit claiming damages and prohibitory injunction. Plaint A schedule property admittedly belonged to the plaintiff. On the eastern side of the plaint schedule property muthiatha chali, a lagoon. It is the plaint B schedule property. Respondent contended that he along with others are riparian owners and the riparian owners have right of possession and enjoyment of lagoon upto its middle and for the proper maintenance and cultivation of their properties, riparian owners are entitled to get the silt removed from the mouth of the lagoon

which touches the Arabian sea. It was contended that when appellant caused obstruction to the removal of silt, O.S.134/1983 was filed by plaintiff and other riparian owners seeking a mandatory injunction and as appellant did not allow the silt to be removed, there was flood and inundation of saline water which could not flow out to the sea causing destruction of mundakam crop and also caused damages to the coconut saplings, coconut trees and erosion of the soil. Plaintiff in this suit claimed the damages of Rs.1000/- for the loss of mundakam crop for the year 1982 , Rs.1200/- as loss of 80 coconut saplings, Rs.700/- as loss of damages to the coconut trees. He also claimed Rs.800/- for restoration of plaint A schedule property to its original position. Plaintiff contended that appellant did not allow him to fish and thereby he lost Rs.300/- being the value of the fish which he could have otherwise got from the lagoon. A decree for mandatory injunction to restore plaint A schedule property into its original position and prohibitory injunction

causing further obstruction were also sought.Appellant resisted the suit disputing the riparian right claimed by respondent. It was contended that plaint B schedule lagoon exclusively belonged to the tarwad of the appellant and neither respondent nor other owners adjoining lagoon have any riparian right over plaint B schedule property. It was contended that they have also no right to catch fish from plaint B schedule lagoon. Appellant also contended that respondent or other persons have no right to remove the silt as the lagoon exclusively belongs to the appellant. It was contended that the entire silt cannot be removed and only a small portion of the silt could be removed touching the arabian sea and it is being done by appellant and not by plaintiff and by non removal of silt no damage was caused and therefore appellant is not entitled to claim damages. The fact that damage was caused and the quantum of damages were also disputed. Appellant also contended that suit is barred under Order II Rule 2 of Code of Civil Procedure as the relief should

have claimed in O.S.134/1983.

2. Learned Munsiff on the evidence of Pws.1 and 2 and DW1 and Exts.A1 to A20, Exts.B1 to B23 and Exts.C1 to C6 found under Exts.A16 and A17 judgment in the earlier suit exclusive right claimed by appellant was decided against him and it was found that appellant and others have riparian right over the lagoon. Learned Munsiff also found that due to non-removal of silt, damage was caused to mundakam crop as well as destruction of coconut saplings and erosion of soil from plaint A schedule property and plaintiff is entitled to the damages. It was found that O.S.134/1983 was earlier instituted seeking a decree against the State and though appellant was also one of the defendants and a decree for injunction was sought against appellant from causing obstruction to the removal of silt, present suit is one for damages and as the damage could be assessed only after Midunam 32 namely 15.7.1983 suit for damages was not barred on account of the failure to claim damages in the earlier suit. Learned Munsiff

granted a decree as sought for by respondent. Appellant challenged the decree and judgment before Sub Court, Tirur in A.S.No.5/1988. Learned Sub Judge on reappreciation of evidence, relying on Exts.A16, A17 and A18 judgments found that riparian right claimed by respondent was upheld by this court which is binding on the appellant. Learned Sub Judge on the evidence confirmed the findings of learned Munsiff with regard to the damages caused. The finding on the objection raised under Order II Rule 2 of C.P.C was also repelled. The appeal was dismissed. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1. Was the court below justified in holding that the plaintiff is a riparian owner, when there were no sufficient materials for the same.

2. Has the law relating to

riparian owners been properly applied in this case when there are no sufficient materials to hold that the plaintiff is a riparian owner.

3. Was court below justified in granting damages when there were no sufficient materials for the same and no sufficient materials to prove the quantum.

4. Is the present suit barred by Order 11 Rule 2.

4. Learned counsel appearing for appellants and respondents were heard.

5. As a contention was raised that Ext.A18 judgment of this court confirming Exts.A16 and 17 judgments is challenged before the Apex Court and it has not become final, that fact was got verified. It is seen from the judgment in Civil Appeal No.1132/1981, that Civil Appeal filed by

appellant challenging Ext.A18 judgment of this court was dismissed by the Supreme Court for default on 12.10.1995. Therefore Ext.A18 judgment of this court confirming Exts.A16 and A17 judgments have become final. In the light of the judgment in Exts.A16 and A17 judgment as confirmed in Ext.A18 judgment, the exclusive right claimed by appellant over plaint B schedule lagoon can only be rejected. This court found that neither appellant nor his tarwad has any exclusive right over plaint B schedule lagoon and it is a natural lagoon and the owners of the property on the bed of the lagoon have riparian right over the water as well as the lagoon including the right for fishing. Therefore in the light of the said decision, substantial questions of law 1 and 2, raised, are to be answered against appellants.

6. Learned counsel appearing for appellant relying on the decision of the Privy council in **Mohammad Khalil Khan v. Maahbub Ali Mian (AIR 1949 P.C. 78)**, and a decision of learned single Judge of this Court in **Raman Ittiyathi v. Pappy Bhaskaran**

**(1989 (2) KLJ 377)** argued that plaintiff is not entitled to split up the cause of action and if the relief sought for in the subsequent suit are available for him to be claimed at the time of the former suit and not claimed in the subsequent suit it is barred under Order 11 Rule 2 of Code of Civil Procedure.

7. True, under Rule 2 of Order 11, every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, though he is entitled to relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court, Ext.B12 the plaint in the former suit shows that the said suit was predominantly one for removal of the silt from plaint B schedule lagoon. Plaintiffs in that suit, which include the plaIintiff herein, sought a direction to the State and other defendants to remove the silt. True a decree for permanent prohibitory injunction was also sought against the appellant and one of the prayer in the present suit is also to restrain him

from interfering with their possession upto the middle of the lagoon as they have got riparian right over the property.

8. On hearing the learned counsel and on the facts of the case, I do not find that provisions of Rule 2 of Order II has any application in the present case. There is no allegation in the plaint that damages claimed was caused either on the date of cause of action in the earlier suit or earlier. Allegation is that damages were caused due to the failure to remove the silt. That damages were not caused on a particular day but a continuing one. Hence cause of action cannot be the same. Moreover it cannot be said that the claim for damages was available to be claimed in that suit. The claim for damages in the suit is one for loss of mundakam crop, which as rightly found by trial court, could be ascertained only after 15.7.1983. O.S.134/1983 was instituted prior to that date. Hence claim for damages could not have been claimed thereunder. So also there is no allegation or evidence that damages to the coconut saplings or other damages

was caused before 15.7.1093. In such circumstance, findings of courts below that suit is not barred under Rule 2 Order II of CPC is perfectly correct.

8. Then the only question is with regard to the damages. As rightly pointed out by learned counsel appearing for respondent, question whether any damage was caused and if so, its cause and the quantum are all questions of fact. The findings of fact arrived at by the trial court and confirmed by the first appellate court cannot be interfered by reappreciating the evidence, as sought for by learned counsel in exercise of the powers of this court under section 100 of Code of Civil Procedure. Though learned counsel appearing for appellant relying on the report submitted by Commissioner argued that Commissioner has reported that it is not possible to say that the damage was caused only on account of the non-removal of the silt, trial court and first appellate court on appreciating the evidence found that damages were caused on account of the non-removal of the silt which in turn was caused by the appellant. Though

learned counsel appearing for appellants argued that there is no evidence to prove the obstruction caused by the appellant, the very contention raised in the written statement as well as before the appellate court was that apart from appellant nobody else was got any right to remove the silt. In such circumstance, even if there is no direct evidence to prove the alleged obstruction caused, it is clear that the non-removal of silt was on account of the action of the appellant. Therefore he is liable for damages. The learned Munsiff has awarded only a reasonable damages of Rs.4000/-. In such circumstance, appeal is dissmissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06

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JUDGMENT

SEPTEMBER,2006